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JOHN F. DAVIS, CL

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 39

HANK AVERY, Petitioner,
against
MIDLAND COUNTY, TEXAS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, et al., Appellants,
against
I. WILLIAM BIANCHI, JR., et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 430

JAMES SAILORS, et al., Appellants,
against
BOARD OF EDUCATION OF THE COUNTY OF KENT, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF MICHIGAN

No. 624

EARLE C. MOODY, et al., Appellants,
against
RICHMOND M. FLOWERS, et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF ALABAMA

No. 724

FRANK A. DUSCH, et al., Appellants,
against
J. E. CLAYTON DAVIS, et al., Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 958

HANK AVERY, Petitioner,

against

MIDLAND COUNTY, TEXAS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Interest of the *Amicus*

The Attorney General of the State of New York is vitally interested in the above appeals insofar as their dis-

position may affect the future structure of municipal and county government.

Numerous suits have been instituted in the courts of our State to compel the reorganization of county boards and other local legislative bodies in accordance with the principle set forth in *Reynolds* v. *Sims*, 377 U. S. 533 (1964). The New York State Office For Local Government reports that a total of 25 counties of the 62 counties in the State have been involved in such litigation. City legislative bodies have been involved in similar litigation to a lesser degree.

The most recent bulletin of our Office For Local Government (Feb. 28, 1967) also indicates that, in the November, 1966 general elections alone, reapportionment plans were considered by referendum in 17 counties. At such elections, twelve plans were approved, five disapproved. As to the latter five counties, action is now being taken to formulate new plans. The local government report states, too, that 13 counties are currently operating with reapportioned legislative bodies including three which have adopted weighted voting plans in November, 1966 and nine in which interim weighted voting has been imposed by court order.

We need not burden the Court with further statistics to demonstrate the need to restore order to local government in New York, as well as other States; and to remove any doubt as to whether, *and to what extent*, this Court intends the principles stated in *Reynolds* to be applicable to county boards and other forms of local government.

The Attorney General of the State of New York, accordingly, files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

Position of the New York Attorney General

(1)

We are informed that the United States Solicitor General, through an *amicus* memorandum filed (March, 1967) in *Avery* v. *Midland County, Texas* (No. 958, Oct. Term, 1966), is expressing doubt that a three-judge statutory court was properly convened in *Board of Supervisors of Suffolk County* v. *Bianchi* (No. 491).

The Attorney General has abstained from active participation in earlier stages of the Suffolk County litigation (No. 491) since it has not concerned the constitutionality of any statute which has state-wide application. That action deals with a provision of the Suffolk County Charter (§ 203), in effect only in a single county of the State.

It further appears from the memorandum for the United States as *amicus curiae* that it is quite doubtful that a three-judge statutory Court was properly convened in No. 624. Since, as we have indicated (*supra*), the New York courts have encountered voluminous litigation involving the question of whether and to what extent county governing boards are to be controlled by this Court's ruling in *Reynolds* v. *Sims, supra,* and related cases, we support the suggestion of the United States Solicitor General (p. 6) that the Court may wish to grant certiorari in the Texas case (No. 958) and set it for argument along with the other cases to determine these questions at this time.

(2)

The New York Court of Appeals has already held that the principle stated in *Reynolds* v. *Sims, supra,* is applicable to local legislative bodies. *Seaman* v. *Fedourich,* 16 N. Y. 2d 94, 101 (1965). It has further held that the courts of New York "obligated as they are to uphold the Federal Constitution as well as the State's Constitution—whose equal protection clause * * * is as broad in its cover-

age as that of the Fourteenth Amendment * * * are vested with jurisdiction of actions brought to vindicate the right to equal representation" (16 N. Y. 2d 94, 102).

In view of the holding in the *Seaman* case, which has been consistently followed by the lower courts in New York, the Attorney General advocates in an appropriate case in this Court (the U. S. Solicitor General suggests No. 958), the extension of the "one person, one vote" principle to local legislative bodies. It has already been so extended in numerous New York cases. See, for example, *Goldstein* v. *Rockefeller*, 45 Misc. 778 (S. Ct., Monroe Co., 1965), where this office urged (pp. 782-783) such extension of the *Reynolds* principle. See also *Town of Greenburgh* v. *Bd. of Supervisors of Westchester County*, 49 Misc. 2d 116 (Sup. Ct., West. Co., 1966), 51 Misc. 2d 168 (1966); and 53 Misc. 2d 88 (reported with deletions, 157 New York Law Journal, No. 29, p. 18, Feb. 10, 1967) where former Presiding Justice NOLAN approved, in principle, reapportionment plans providing for both weighted voting and multi-member districts, as methods of effectuating the "one person, one vote" principle.

(3)

We urge, however, that this Court, in extending the principle of "one person, one vote" to local legislative bodies, permit adequate variety in the manner in which local governments may comply with this principle. The New York rule set forth in the *Seaman* case (*supra*) does not preclude local governments in New York, which have been granted a considerable degree of "home rule" power* from adopting many forms of local government, including those which provide for modified weighted voting, to achieve compliance with the principles of the *Reynolds* case. Even one of the most enthusiastic advocates of this Court's decision in *Reynolds* has recognized that this Court

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*See New York Constitution, Art. IX, § 8; and New York Municipal Home Rule Law (McKinney's Cons. Laws of New York, Book 35-C).

has "reserved to the states the traditional room for experimentation and maneuver". McKay, *Reapportionment* (1965), p. 254.

The leeway required for variety in providing fair representation of voters in local governmental affairs was recognized by the three-judge Court convened in *Blaikie* v. *Wagner*, 258 F. Supp. 364 (D.C.N.Y., 1965). That Court held that the *Reynolds* principle did not prevent a city-wide limited voting system designed to afford representation to a minority party in each county of the city. More recently, this need for variety was recognized in the latest opinion in the Westchester County case.* See also, Dixon,

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* In recognizing the need for an element of discretion in the manner in which county governments shall conform to the principle of "one person, one vote", Justice NOLAN stated (157 N.Y.L.J., *supra*, p. 18):

> "Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (cf. *Reynolds* v. *Sims*, *supra*, 377 U. S. 533, 578; *Swann* v. *Adams*, *supra*). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county board of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. The composition of boards of supervisors has been provided for by state laws presumably for reasons which the Legislature considered sufficient, and while those laws may be superseded under home rule powers, or charter provisions there is no reason why a board of supervisors should not attempt to comply with them in so far as it may be possible to do so if that purpose can be effected without violation of the constitutional rights of the citizens of the country. The towns and the cities are political subdivisions of the county, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever."

Reapportionment Memorandum on Floterial Districting, Population Variances Among States, And Additional Elements of Fair Representation (Dec. 5, 1966), pp. 31-34.

Dated: New York, New York, March 15, 1967.

Respectfully submitted,

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